Supreme Court, U.S.
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No. 01-518

IN THE SUPREME COURT OF THE UNITED STATES

BE&K CONSTRUCTION CO.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

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SUMMARY OF ARGUMENT

The Briefs of the NLRB and the Respondent Unions have failed to justify the Board's Order against BE&K. The ambiguous language in *Bill Johnson's Restaurants*, on which the opposing parties heavily rely, was not essential to the resolution of the contested issue in that case, and was therefore *dicta* which should not be followed. In any event, the NLRB's interpretation of *Bill Johnson's*, if adopted by the Court, would create a glaring inconsistency in the Court's holdings with regard to the definition of the term "meritorious" litigation, which the Court has previously defined and protected under its "objective basis" standard.

The NLRB Brief further ignores or minimizes the sanction of illegality which the Board seeks to impose on BE&K. It is this sanction, and not the mere shifting of attorneys fees, which creates important commonalities for the purpose of First Amendment analysis between the NLRA and the antitrust laws, as the Court has previously recognized. The NLRB Brief confirms that the Board is refusing to accommodate its statutory scheme to the other equally important Congressional objectives expressed in the Sherman Act and the LMRA, in plain violation of this Court's holding in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). *See also Hoffman Plastic Compounds, Inc. v. NLRB*, 70 U.S.L.W. 4209, 4211 (Mar. 27, 2002).

Contrary to the Board's exaggerated claims, nothing in BE&K's petition requires the Court to apply the First Amendment in such a way as to interfere with the enforcement of attorney fee shifting statutes, federal court rules or the common law of torts. For the purpose of resolving this case, there is no need for the Court to broadly apply the First Amendment beyond the framework of the antitrust and labor laws, *where the Court has already applied it*. The Court should deny enforcement of the Board's Order.

ARGUMENT

I. The Opposing Briefs Have Failed To Reconcile The NLRB's Bifurcated First Amendment Standard With The Holdings of This Court.

In its Opening Brief, Petitioner BE&K demonstrated that this Court has consistently found "objectively based" litigation to be protected from statutory claims of unlawfulness, under the antitrust laws and in other contexts, including the NLRA. (BE&K Br. at 14-26). BE&K further argued that the NLRB's creation of a bifurcated standard for assessing the legality of litigation under the National Labor Relations Act stems from a misreading of this Court's holding in *Bill Johnson's Restaurants* v. NLRB, 461 U.S. 731 (1983). BE&K showed that the Board's bifurcated standard was both anomalous and unworkable and should be rejected by this Court in favor of the uniform application of the standard articulated in *Professional Real Estate Investors v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993).

In response, the NLRB and the Respondent Unions have attempted to justify the Board's overbroad reading of *Bill Johnson's* and to deflect the compelling rationale of *Professional Real Estate*. Despite all evidence to the contrary, they maintain that the *Bill Johnson's* Court intentionally authorized the Board to sanction meritorious, though unsuccessful, litigation upon its completion, even though that issue was not contested before the Court in *Bill Johnson's* and even though the Court reached the opposite conclusion in *Professional Real Estate* (NLRB Br. at 18-27). The opponents further argue from inconsequential differences between the NLRA and the antitrust laws that a "completed case" exception to First Amendment protections is justified under the NLRA alone. (NLRB Br. at 39-46). Each of these arguments is unavailing and should be rejected by the Court.

At the outset, the opposing briefs rely heavily on language in *Bill Johnson's* relating to completed litigation, which BE&K has previously challenged as *dicta*. (BE&K Br. at 16). According to the NLRB, the "completed case" discussion of *Bill Johnson's* was not *dicta*, because it related to an issue that could be contested before the Board on remand at a later date. (NLRB Br. at 22-27). The NLRB cites no authority for this mistaken proposition.

This Court has defined as *dicta* any discussion in an opinion that is not "essential" to the Court's disposition of the issue actually before it. *Central Green Co. v. United States*, 531 U.S. 425, 431 (2000); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 23 (1994). In *Bill Johnson's*, the Court identified the issue before it as follows:

> We must decide whether the National Labor Relations Board may issue a cease-and-desist order to halt the prosecution of a state-court civil suit brought by an employer to retaliate against employees for exercising federally-protected labor rights, without also finding that the suit lacks a reasonable basis in fact or law.

461 U.S. at 733.[1] It is undisputed that the *Bill Johnson's* Court answered this question in the negative, after detailed constitutional and statutory analysis. Thus, the "holding" of the Court on the sole issue contested before it was that a "well-founded lawsuit may not be enjoined as an unfair labor practice," in that it is "not unlawful to prosecute a meritorious action" under the NLRA. 461 U.S. at 743.

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[1] The Petition for Certiorari in *Bill Johnson's* likewise urged the Court only to find that the employer "could not properly be enjoined from maintaining its state-court action." *Id.* at 737.

The Court's later observations in *Bill Johnson's* about the possible future treatment by the NLRB of completed litigation were not "essential" to the contested issue before the Court, and were therefore *dicta*. Any doubt on this point was removed by the Court itself in *Professional Real Estate*, where the Court described the holding of *Bill Johnson's* as being that "even an improperly motivated lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is baseless," while ignoring the *dicta* now relied on by the NLRB. 508 U.S. at 59.[2]

The NLRB Brief fails to address these points. The language of *Bill Johnson's* on which the Board exclusively relies must be treated as *dicta* by the Court. As a result, contrary to the NLRB's Brief, at 25-27, no basis exists for invoking *stare decisis* with respect to the ambiguous "completed case" discussion in *Bill Johnson's*.

This Court has properly invoked the doctrine of *stare decisis* only to support judicial holdings of statutory interpretation which are clear and unequivocal, and which the Court is understandably reluctant to set aside. It is only in that context that the Court has declared the doctrine of stare decisis to have "special force." *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989). By contrast, the Court has repeatedly held that it will not be bound by *dicta*. *Central Green Co. v. United States*, *supra*, 531 U.S. at 431; *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, *supra*, 513 U.S. at 23. The Court has further

[2] "Had the [*Professional Real Estate*] Court believed that the statements in *Bill Johnson's* [regarding completed litigation] had any effect, we would expect that it would have explained why it did not apply them in the case before it. The fact that the Court did not do so indicates that it considered the statements *dicta*." *White v. Lee*, 227 F. 3d 1214, n.18 (9th Cir. 2000), cited in BE&K's Brief, at 23.

disclaimed reliance on prior opinions where the language in question is ambiguous, confusing, or unworkable, particularly as regards constitutional issues. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("*Stare decisis* is not an inexorable command. Indeed, when governing decisions are unworkable or are badly reasoned this Court has never felt constrained to follow precedent.").[3]

In the present case, the ambiguous *dicta* in *Bill Johnson's* does not bear the weight which the NLRB has put on it. Particularly with regard to the meaning of the term "meritorious litigation," the Court's language is inconsistent, both as to the terminology used elsewhere in the same opinion, and as compared to other decisions of the Court.

Thus, the NLRB Brief asserts that the *Bill Johnson's* Court intended to use the term "without merit" to describe completed litigation which was merely unsuccessful (NLRB Br. at 22), yet the Court elsewhere in the same opinion clearly equated "merit" with "reasonably based" litigation. *See* 461 U.S. at 743. The NLRB Brief offers no explanation as to why "merit" should mean different things on different pages of the opinion. This internal inconsistency within the *Bill Johnson's* opinion (as interpreted by the Board) further undermines the NLRB's reliance on the Court's ambiguous language, *dicta* or not, as support for a statutory sanction

[3] For the same reasons, contrary to the NLRB Brief, at 25, Congressional inaction in the present context offers no guidance to the Court, and certainly is no endorsement of the ambiguous *dicta* of *Bill Johnson's*. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation."); *accord Brecht v. Abrahamson*, 507 U.S. 619, 632-33 (1993).

which would conflict with the First Amendment.[4]

The NLRB also has not explained why the Court in *Bill Johnson's* should have adopted a new definition of "meritorious" in part of that case (if it in fact did so), without even acknowledging the contrary definition set forth in *Christiansburg Garment v. EEOC*, 434 U.S. 412, 421-22 (1978). As noted in BE&K's Brief, at 19-20, the Court prior to *Bill Johnson's* defined "meritless" as "unreasonable." Therefore, when the *Bill Johnson's* Court spoke of completed litigation as potentially violating the NLRA if it is "without merit," the Court must be presumed to have been applying the same definition it had previously established in *Christiansburg*.[5]

Again, any doubt on this score was removed by the Court's holding in *Professional Real Estate*. There, the Court not only characterized the *Bill Johnson's* holding as barring a

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[4] Nothing in the "prior restraint" cases arising under the Speech or Press clauses of the First Amendment, cited in the NLRB Brief at 36-37, supports altering the substantive definition of what constitutes lawful conduct in post-injunction proceedings. *See, e.g., Alexander v. United States*, 509 U.S. 544, 553-54 (1993). Indeed, the cases cited by the NLRB support BE&K's interpretation of *Bill Johnson's* as creating a largely procedural distinction between ongoing and completed litigation. The Court used the same terminology to describe the conduct which the First Amendment would protect, i.e., "meritorious" litigation, whether before or after the litigation is completed.

[5] The NLRB Brief attempts to distinguish *Christiansburg* on the irrelevant ground that the case did not address constitutional issues. (NLRB Br. at 29). BE&K's Brief did not cite *Christiansburg* for the purpose of asserting that its holding was constitutionally based. (BE&K Br. at 19-20). BE&K cited only the indisputable fact that the Court in *Christiansburg* had defined the term "meritless" as "unreasonable and without foundation." That same definition was adopted by the Court in *Professional Real Estate Investors*, and there is simply no reason to believe that the *Bill Johnson's* Court intentionally crafted a new definition applicable exclusively to the NLRA without acknowledging that it was doing so.

finding of illegality as to meritorious (i.e., non-baseless) litigation, but the Court in *Professional Real Estate* itself definitively established that the First Amendment protects litigation from statutory sanction so long as the litigation is not "objectively baseless."

There is no merit to the NLRB's claim that the *Professional Real Estate* holding has no relevance to the NLRA or that a different First Amendment standard should be applied to litigation under the latter statute. (NLRB Br. at 28). This claim has already been refuted by the Court's own repeated cross-referencing between its labor and antitrust cases. As previously noted by BE&K but not explained by the NLRB, the *Bill Johnson's* Court expressly relied on the First Amendment discussion set forth in the antitrust case of *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). In turn, the *Professional Real Estate* Court cited the holding of *Bill Johnson's* with approval in clarifying the applicability of the "objectively baseless" standard to antitrust litigation. Thus, contrary to the argument of the NLRB, this Court has already found that the antitrust laws and the NLRA should be construed *in pari materia* with regard to the Petition Clause of the First Amendment.

In any event, the purported differences between labor and antitrust laws identified by the NLRB and the Unions do not support a different analysis of the First Amendment's Petition Clause as it relates to both statutory schemes. Under both the antitrust laws and the NLRA, unsuccessful plaintiffs may be threatened with a chilling and unknowable risk of being declared to have acted illegally if the statutory prohibitions are held to sanction "objectively based" litigation. Plaintiffs under either law may face considerable expense, discovery and lengthy proceedings (seven years in the present case) if their litigation is challenged as unlawful. Moreover, in both the antitrust and labor settings, the unsuccessful plaintiff is faced with a *statutory sanction* – a

potential declaration that the litigant has violated the law based solely upon the filing of a reasonably based lawsuit – which infringes most directly upon First Amendment rights under both the antitrust and labor laws.

The NLRB Brief dwells on the theoretical "protections" afforded to employers by the Board and its General Counsel, including the additional required element of retaliatory motivation. (NLRB Br. at 42-48). In reality, the NLRB has established a track record since *Bill Johnson's* of automatically finding every unsuccessful employer lawsuit that has come before it to violate the Act, if the suit relates in any way to protected activity. *See, e.g., Phoenix Newspapers*, 294 NLRB 47, n.21 (1989)(Member Cracaft dissenting). *Rondout Electric, Inc.*, 329 NLRB 957 (1999), cited by the NLRB Br. at 47, is the *only* known case since *Bill Johnson's* in which the Board found no violation by an employer plaintiff who had completed unsuccessful litigation against employees (who avoided sanction only by showing that the suit did not relate to protected activity at all).[6]

The NLRB Brief ignores the chilling effect on employers of the Board's statutory sanction and incorrectly attempts to treat this case as a mere "fee shifting" exercise, giving little if any notice to the substance of the Board's Order of *illegality* against BE&K. (NLRB Br. 30). Contrary to the NLRB Brief, fee shifting is not the primary issue here. Rather, the case has reached this Court because the Board has done that which the Court prohibited in both *Bill Johnson's* and *Professional Real Estate, i.e.,* the Board has found

[6] The fact that retaliatory motivation is another required element under *Bill Johnson's* is in any event directly parallel to the *Professional Real Estate* standard and does not in any way obviate the need to prove that the litigation is objectively baseless. *See* 508 U.S. at 60 ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation.").

unlawful the filing and maintenance of a suit in court that had an objective basis. Such a finding of illegality has many potential consequences to employers beyond payment of attorneys fees.[7] In any event, finding objectively based litigation to be illegal is inconsistent with the plain language of the First Amendment, under both antitrust and labor laws, and the same standard should apply.[8]

The NLRB Brief also erroneously contends that the Board is entitled to give less deference to federal lawsuits than it did to the state court litigation contested in *Bill Johnson's*. (NLRB Br. at 38). This contention by the Board is unsupportable in light of the Court's decision in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942). In *Southern Steamship*, referenced in BE&K's Brief at 28 but ignored throughout the NLRB Brief, the Court declared that the NLRB is required to accommodate its statutory scheme to "other equally important Congressional objectives." The Court has quite recently reaffirmed the importance of the *Southern Steamship* doctrine in *Hoffman Plastic Compounds v. NLRB*, 70 U.S.L.W. 4209, 4211 (Mar. 27, 2002).

[7] Among other consequences, a finding of unlawful conduct under the NLRA injures an employer's reputation and goodwill with its customers and employees and may lead to threats of debarment from future work.

[8] In an unsuccessful effort to show "balance" on the part of the Board, the NLRB Brief inappropriately relies on cases in which the Board has found lawsuits filed by unions violative of the Act under the *Bill Johnson's* standard. (NLRB Br. at 20). Nearly all of the cases cited are inapposite, because they arose under footnote 5 of *Bill Johnson's*. In that footnote, the Court declared that the First Amendment offers no protection to any suit which is preempted by the NLRA or which has an "illegal" (as opposed to merely retaliatory) objective. 461 U.S. at 737, n.5, citing *inter alia, Granite State Jt. Bd., Textile Workers Union Local 1029 v. NLRB*, 409 U.S. 213 (1972). Here, BE&K's case was not decided under either of the alternative theories referenced in footnote 5. It is misleading for the Board to rely now on cases decided upon an entirely separate ground from the present case.

Here, BE&K's lawsuit, which the NLRB has declared to be unlawful, was expressly authorized by both the Sherman Act, 15 U.S.C. § 1, and the Labor Management Relations Act, 29 U.S.C. § 187. Contrary to the NLRB Brief, the Board was required by *Southern Steamship* to accommodate these competing statutes by dismissing the allegations of illegality against BE&K in the absence of a finding of objective baselessness. The NLRB's myopic view of its authority, expressed anew in its Brief, is entitled to no deference and must be denied enforcement.

II. The Post Hoc, Exaggerated Policy Concerns Raised In The Opposing Briefs Are Without Merit And Should Be Rejected.

In response to BE&K's request for the Court to apply the common sense "objective basis" standard to completed litigation under the NLRA, the opposing parties have conjured up a parade of "horribles" that would supposedly result from a "rigid" application of the *Professional Real Estate* standard outside the antitrust context. (NLRB Br. at 29-34). The opposing arguments mischaracterize BE&K's contentions and misstate applicable law.

First, it must be noted that none of these arguments was expressed by the NLRB in its Order or Opinion. Therefore, it is improper for such post hoc rationalizations to be put forward now. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *NLRB v. Yeshiva University*, 444 U.S. 672, 685, n. 22 (1980) ("The Court will not consider post hoc rationalizations of agency counsel, and will decide the case based solely upon the rational expressed by the challenged agency.").

In any event, the fears expressed by the NLRB's counsel here are wildly overblown. Contrary to the NLRB

Brief, at 30, no "breathtaking implications" arise from the application of the *Professional Real Estate* standard to protect objectively based antitrust litigation from a finding of illegality under the NLRA.

Certainly, adhering to the *Professional Real Estate* standard under the NLRA does not "constitutionalize" (though it is consistent with) the American Rule on attorneys fees. NLRB Br. at 34, citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Nor does the Court's *Professional Real Estate* standard invalidate any attorneys fee shifting statute. As BE&K has noted above, there is an important distinction between a law that merely shifts fees in litigation versus a statute like the NLRA (as construed by the NLRB) which imposes the sanction of *illegality* on a plaintiff who has pursued litigation with a reasonable basis.[9]

Similarly, nothing in BE&K's Petition calls for the Court to declare Rule 11 of the Federal Rules of Civil Procedure to be in violation of the First Amendment. (NLRB Br. at 31-32). As interpreted by numerous courts, Rule 11 only imposes sanctions upon attorneys who file pleadings for an improper purpose if such pleadings also lack a reasonable basis. (In other words, Rule 11 has already been interpreted in conformance with the *Professional Real Estate Investors* standard.) *See Sussman v. Bank of Israel*, 56 F. 3d 450 (2d Cir. 1994); *National Assn. of Govt. Employees, Inc. v. National Federation of Federal Government Employees*, 844 F. 2d 216, 244 (5th Cir. 1988); *Townsend v. Holman Consulting Corp.*, 929 F. 2d 1358, 1362 (9th Cir. 1990)("A determination of improper purpose must be supported by a

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[9] For the same reason, contrary to the NLRB Brief at 31, there is no inconsistency between the *Professional Real Estate* standard and the Norris-Laguardia Act, 29 U.S.C. § 107. The latter statute merely shifts fees to an unsuccessful plaintiff, with no attendant finding of illegality in the plaintiff's filing or pursuit of a labor injunction.

determination of frivolousness when a complaint is at issue.").[10]

The NLRB similarly overstates the conflict between the *Professional Real Estate* standard and the tort of abuse of process. (NLRB Br. at 32-33). As that tort is described in Prosser and Keeton on Torts § 121 (5th Ed. 1984): "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions....There is in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Again, there is no conflict between these common law principles and the "objective basis" standard for filing a complaint set forth in *Professional Real Estate Investors.*[11]

Of course, it is completely unnecessary for the Court to address the fine points of tort law or any other claimed litigation sanction other than the NLRA and the antitrust laws. BE&K is not asking the Court to apply the First Amendment to any law except those to which the Court *has already applied it.* It is undisputed that the Court has applied the First Amendment to both the antitrust laws and the NLRA so as to protect lawsuits from being declared unlawful under either statute where such lawsuits are supported by probable cause and/or an objective basis. No broader holding is

[10] *See also Professional Real Estate, supra*, 508 U.S. at 65, citing Rule 11 as being consistent with the Court's standard.

[11] Similarly, there is no conflict between the *Professional Real Estate* standard and the inherent power of the courts to assess attorneys fees for bad faith actions during the course of litigation. *Chamber v. NASCO, Inc.*, 501 U.S. 32, 44-46 (1991).

required here to establish that the NLRB Order in this case violates the First Amendment and cannot be enforced.[12]

Finally, the NLRB's claim that the NLRA will be "compromised" by allowing employers to file objectively based suits against employees or unions (NLRB Br. at 45), is belied by the Board's own longstanding interpretation of the Act prior to *Bill Johnson's*. For two decades after the Board's decision in *Clyde Taylor Co.*, 127 NLRB 103, 109 (1960), the Board declined to prosecute any reasonable employer litigation due to the same First Amendment concerns now being raised by BE&K. The NLRB has identified no discernible impact from its former policy on employee/union activities during that period. Since *Bill Johnson's*, however, employer rights have been chilled by the Board's failure properly to protect meritorious litigation from sanction under the NLRA, as the amicus briefs from a broad cross-section of the business community attest. By clarifying the First Amendment standard now and reaffirming that objectively based litigation is protected under the NLRA and the Constitution, the Court will restore a workable balance between the rights of employers, unions, and employees.

[12] Neither the NLRB nor the Unions have contested BE&K's assertions that the underlying litigation in this case was supported by probable cause and was not objectively baseless. Contrary to the Board (NLRB Br. at 40), no remand is required in order to hold that BE&K's conduct was lawful under the NLRA and that the NLRB's Order is not entitled to enforcement. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67, n.6 (1969)..

CONCLUSION

For the reasons set forth above and in BE&K's Brief, the Court of Appeals should be reversed and the NLRB's Order should be denied enforcement.

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